Wisconsin Judicial Benchbooks
Criminal and Traffic
Volume I
2023–24 Supplement
Insertion Instructions

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NOTE: The five volumes of the *Wisconsin Judicial Benchbooks* are supplemented regularly with replacement pages.

This is the second supplement to the Seventh Edition of *Wisconsin Judicial Benchbooks: Criminal and Traffic*. The first supplement was released in 2023. **Before inserting the 2023–24 supplement**, go to the copyright page in your book to be sure that it is up to date. Only insert this 2023–24 supplement if the copyright section includes the following text:

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If the copyright section in your book does not include this text, you will need to order additional updates from the State Bar of Wisconsin at (800) 728-7788 (nationwide) or (608) 257-3838 (Madison area).

Special Note for Judges: Your copies of the *Criminal Benchbook* might not have a Volume IA; for those copies, these supplement pages will be inserted into only a single Volume I.

Item included with this update:

- *Wisconsin Judicial Benchbook, Vol. I: Criminal and Traffic* Ed-7 S2 © April 2024

KPS0025E07S02

NOTE: *This Benchbook is being redesigned. The pages to be inserted may have a slightly different layout than those in the previous version of the book. The redesign will be complete with the next revision.*

Remove and Discard	**Insert**
Title page/Copyright page	Title page/Copyright page
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User's Guide and Abbreviations (xxi/xxii)	User's Guide and Abbreviations (xxi/xxii)
Table of Contents (TOC-1 through TOC-14)	Table of Contents (TOC-1 through TOC-14)
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CR 2-7/CR 2-8	CR 2-7/CR 2-8

—continued—

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Volume IA

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WISCONSIN JUDICIAL BENCHBOOKS

VOLUME I
Criminal and Traffic

Seventh Edition

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to be cited as independent legal authority
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IN MEMORIAM

RONNI G. JONES

April 12, 1941—November 7, 2002

The Wisconsin Judicial Benchbooks have borne the imprint of their Project Editor, Ronni Jones, since 1988 when Ronni first assumed this task for the Office of Judicial Education. In that time, the judges and lawyers of this state have benefited from her focused dedication to the creation and maintenance of a useful, practical resource for Wisconsin's trial judges. And those of us who had the good fortune to know and to work with Ronni have benefited from the friendship and collegiality of this vibrant, witty, and generous woman.

Ronni brought to her work a fierce intelligence and a logical and discerning approach to solving problems. Along with it came a marvelous sense of humor and a dry wit served up with a trace of a Brooklyn accent. Ronni was the genuine article. It was fun to see her discuss a case or a legal issue with a group. She was energized by the intellectual discussion, but always with a purpose; she unfailingly kept her eye on the practical goal of how the end product could be used to assist judges.

Ronni's commitment to judicial education is perhaps not surprising. When she entered law school at the age of 42, she had already combined raising a family with a history of work in training and education, and a track record of commitment to volunteerism and public service. She was married for 40 years to P. Charles Jones, a bright and thoughtful Dane County judge who was himself a longtime member of the Civil Benchbook Committee. And she loved a challenge.

Warmth and humor infused Ronni's relationships with the people she knew and worked with. She was gracious and unpretentious, encouraging and delighting in conversation whether around the conference table or the dinner table. She was a facilitator in the best sense of the word; she wanted to include everyone in the discussion or in the gathering or in the party.

Ronni loved her work but more so the abiding friendships developed in the course of her work. We remember her with gratitude as a judicial educator who helped to make us better judges. And we remember her with fondness as a friend who, along the way, helped to make us better people.

The Wisconsin Judicial Benchbook Editorial Committees
April 15, 2003

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PREFACE

For 40 years now, the Wisconsin Office of Judicial Education and the hard-working members of the five Benchbook Committees have provided Wisconsin's judges with a practical, everyday working tool for judging cases fairly, correctly, and efficiently. The Benchbooks are a comprehensive guide, a distillation of the law as well as the experience, practice, and thought of many outstanding Wisconsin judges and attorneys. The Benchbooks have proved particularly valuable to new judges and to experienced judges who are periodically rotated to new assignments.

The original Benchbooks, first published in 1982, numbered only three. There have been many improvements since:

- In the 1980s, we took the growing family law materials out of their original volume, where they had been joined with the probate, mental health, and juvenile materials, and published them as a separate volume. In 1994, juvenile materials and probate and mental health materials were given their own separate volumes.

- Since the fall of 1983, the State Bar of Wisconsin has made the Benchbooks available to the legal community at large. The Judicial Education Office is grateful for the enthusiastic technical publication assistance provided over the years by the State Bar directors and their staff.

- The Benchbooks have become a collective work of a much broader group of experts. In the beginning, the Benchbook volumes were primarily the product of a relatively small group including the Director of Judicial Education, the Benchbook Project Manager, members of a single advisory committee, individual judge and attorney contributors and reviewers, and a series of part-time attorneys working with the Judicial Education Office as researchers and editors. A tremendous amount of the work was performed by the "Judicial Editor," Judge Angela B. Bartell. Since 1992, however, the work has been spread among five committees (one responsible for each volume), whose members write and edit most of the rough drafts and all final substantive drafts of updates, revisions, and expansions. And since 1993, they have been assisted by a permanent researcher/editor who fills a half-time position in the Judicial Education Office. Program Attorney Ronni Jones (to whom all of these volumes are dedicated—see the memorial at the front of this volume) was the first. Between 2001 and 2015, the committees were served by Attorney Karla Baumgartner, until she assumed the position of Director of the Office of Judicial Education. In 2016, Attorney Hana Miura became the latest editor to join this project.

- Starting in 1994, we have issued a published update of each Benchbook volume virtually every year.

- The Benchbook committees continue to take advantage of periodically scheduled revisions as opportunities to revamp each volume, streamlining them and making them more user-friendly.

- The Benchbooks are now available to judges online, for even more immediate and convenient reference.

Each of the Benchbook Committee Chairs serves a term of five years. Committee members serve two- or three-year terms, and may serve more than one term. The original benchbook committees were as follows:

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Special gratitude is owed to these individuals and groups:

- Reserve Judge Angela B. Bartell, who served as Judicial Editor for an entire decade, and who, as a result of countless hours of writing and editing and unwavering dedication, devotion, and guidance, nurtured the Benchbooks and established them as the resource judges and lawyers rely on so heavily.
- The members of the Wisconsin Supreme Court, its Judicial Education Committee, and the Director of State Courts. Their constant support makes possible not only the Benchbooks, but all of the many educational programs offered by the Judicial Education Office for the Wisconsin judiciary.
- David H. Hass, who served as Director of the Office of Judicial Education from 1997 to 2013. His professionalism, dedication, and quiet competence provided a solid foundation for ensuring that Wisconsin remained a leader in judicial education.

March 2022

Office of Judicial Education, Wisconsin Court System

Pre-1994
ACKNOWLEDGMENTS

We wish to thank the following people who contributed to the Wisconsin Judicial Benchbooks and supplements. Their generous contributions and assistance make these benchbooks reflect Wisconsin's best judicial practices and techniques. To each of them the Supreme Court Office of Judicial Education expresses its profound gratitude.

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USER'S GUIDE AND ABBREVIATIONS

The Wisconsin Judicial Benchbooks are unique legal publications, designed as highly functional practice aids. Standard rules of sentence and punctuation have been modified to accommodate the terse outline style used throughout. Easy access to the text can be achieved in three ways: (1) through the comprehensive Table of Contents at the beginning of each volume, (2) through the Major and Minor Subject Tab System, and (3) through the Table of Contents at the beginning of each Minor Subject Tab.

Citations have been placed in the left margin, corresponding to the block of text for which they are authority. While every effort has been made to ensure that the citations of authority are accurate and the suggested procedures are appropriate, the Benchbooks (as any practice aid) must be used with caution. **THE USER IS ADVISED TO CONSTANTLY TEST THE BENCHBOOK'S CITATIONS AND SUGGESTED PROCEDURES AGAINST THE USER'S CONTINUING ORIGINAL RESEARCH, EXPERIENCE, AND COMMON SENSE.**

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Citation Abbreviations

A2d	Atlantic Reporter, 2nd series
ABA Stds	American Bar Association Standards
ALR	American Law Reports
ALR2d	American Law Reports, 2nd series
ALR3d	American Law Reports, 3rd series
ALR4th	American Law Reports, 4th series
Am Jur	American Jurisprudence
Am Jur 2d	American Jurisprudence, 2nd series
CJ	Corpus Juris
CJS	Corpus Juris Secundum
Const	Constitution
Cr L	Criminal Law Reporter
F	Federal Reporter
F2d	Federal Reporter, 2nd series
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FS	Federal Supplement
IRC	Internal Revenue Code
LEd2d	Lawyers Edition, 2nd series
OAG	Attorney General Opinion
P2d	Pacific Reporter, 2nd series
Pin	Pinney's Wisconsin Reports
RMC	Records Management Committee
SCR	Wisconsin Supreme Court Rules
SCt	U.S. Supreme Court Reporter
St	State
SW2d	South Western Reporter, 2nd series
USC	United States Code
USCA	United States Code Annotated
Wis Adm Code	Wisconsin Administrative Code
Wis JI-Cr	Wisconsin Jury Instructions, Criminal
Wis JI-Cv	Wisconsin Jury Instructions, Civil
Wis JI-Cr, SM	Wisconsin Jury Instructions, Criminal, Special Materials

Note: At times, the user will encounter citations that include abbreviations other than those listed above. The Benchbook format restricts printing the full, unabbreviated names. We regret any inconvenience this may cause, but we are confident that in most instances, the abbreviations are self-evident.

Text Abbreviations

AG	Attorney General
AOD	Alcohol and Other Drugs
AODA	Alcohol and Other Drugs Abuse
Asst	Assistant
Atty	Attorney
AV	Audiovisual
Bd	Board
CCAP	Consolidated Court Automation Programs (wcca.wicourts.gov)
CDL	Commercial Driver's License
Ch	Chapter
CHIPS	Child in Need of Protection or Services
CIP	Challenge Incarceration Program
CMV	Commercial Motor Vehicle
Co	Company
Comm'r	Commissioner
Corp	Corporation
CSA	Child Support Agency
Ct	Court
Cty	County
DA	District Attorney
Def	Defendant
Dept	Department
DHS	Department of Health Services
DL	Driver's License
DOA	Department of Administration
DOC	Department of Corrections
DOT	Department of Transportation
DWD	Department of Workforce Development (formerly DILHR)
ERP	Earned Release Program
ERRC	Earned Release Review Commission
ES	Extended Supervision
FCC	Family Court Commissioner
GAL	Guardian ad Litem
Gdnshp	Guardianship
ICJ	Interstate Compact on Juveniles
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
IID	Ignition Interlock Device
Ins	Insurance
Juv	Juvenile
PAT	Positive Adjustment Time
PBT	Preliminary Breath Test
Prelim	Preliminary Hearing, Preliminary Examination
PSI	Presentence Investigation, Presentence Report
PD, SPD	State Public Defender
RCCCY	Residential Care Center for Children and Youth
RCS	Operating with a Restricted Controlled Substance
SAP	Substance Abuse Program
Std	Standard
TPR	Termination of Parental Rights
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
US	United States
Wis	Wisconsin

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§ 950.02

1. Selected Definitions

§ 950.02(1)

A. "Child" is person who is less than 18 years of age, except as provided in § 950.02(3)

§ 950.02(3)

B. "Family member" is spouse, minor child, adult child, sibling, parent, or legal guardian

Wis Const art I, § 9m(1)(a)
§ 950.02(4)(a)

C. "Victim" is any of the following

1) Person against whom crime committed, or

2) Parent, guardian, legal custodian if person in 1) is a child, or

3) If person in 1) is deceased

   a. Family member of deceased

   b. Person who resided with deceased

Wis Const art I, § 9m(1)(a)

D. "Victim" does not include the following

1) Accused, or

2) Person the Ct finds would not act in the best interest of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise rights

§ 905.045(1)(e)

E. "Victim advocate" means an individual who is an employee of or volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim

Wis Const art I, § 9m(2)(a)–(p)

2. Constitutional Rights

A. Crime victims have the following rights during the criminal and juvenile justice process

1) Be treated with dignity, respect, courtesy, sensitivity, and fairness

2) Privacy

St v Johnson
2023 WI 39
407 Wis. 2d 195

a. Privately held medical records are privileged from disclosure

3) Proceedings free from unreasonable delay

4) Timely disposition of the case, free from unreasonable delay

5) Upon request, to attend all proceedings involving the case

6) Reasonable protection from the accused

7) Upon request, to reasonable and timely notification of proceedings

8) Upon request, to confer with the Atty for the government

St v Johnson
2023 WI 39
407 Wis. 2d 195

9) Upon request, to be heard at any proceeding that implicates a victim's right

10) Have information about the economic, physical, and psychological effect upon the victim submitted to the Ct and considered

11) Upon request, to timely notice of any release, escape, or death of the accused

12) Refuse an interview, deposition, or other discovery request made by the accused

13) Full restitution and assistance collecting restitution

St v M.L.J.N.L.
(In Int of M.L.J.N.L.)
No 2021AP1437
(Wis. Ct. App. 2/28/2024)
(publication recommended)
See also §§ 938.34(5)(a) 973.20

a. Restitution request still subject to statutory hearing procedures and criteria

14) Compensation

15) Upon request, reasonable and timely information about the investigation and outcome of the case

16) Timely notice of all rights and how they can be enforced

Wis Const art I, § 9m(6)

B. Victims are not afforded party status to a case

Wis Const art I, § 9m(2) & (6)
St v Johnson
2023 WI 39, ¶ 44
407 Wis. 2d 195

C. Victims' rights shall be protected in a manner no less vigorous than the Def's, but may not supersede a Def's federal constitutional rights

3. Consultation Requirements

A. Ct to inquire whether DA has complied with consultation requirements of victims' rights law

§ 971.08(1)(d)
§ 971.095(2)
§ 950.04(1v)(j)

1) Before accepting plea of guilty or no contest

§ 971.315
§ 971.095(2)
§ 950.04(1v)(j)

2) Before dismissing case

§ 972.14(2m), (3)
§ 950.04(1v)(L), (m)

3) Before pronouncing sentence

4. Court Action

§ 971.10(3)(b)3.
§ 950.04(1v)(ar)

A. Ct must consider interest of victims before granting continuance

Wis Const art I, § 9m(2)(i)
§ 972.14(3)(a)
§ 950.04(1v)(m)

B. If requested by victim, Ct must allow victim to make a statement at sentencing

Wis Const art I, § 9m(2)(i)
§ 950.04(1v)(b)

C. Ct must allow victim to attend all proceedings involving the case

§ 950.04(1v)(b)
§ 906.15(2)(d)

Except Ct may sequester testifying victim if necessary to provide a fair trial

Mere presence of victim during testimony of other witnesses may not form sole basis to sequester victim

Wis Const art I, § 9m(2)(m)
§ 973.20(1r)
§ 950.04(1v)(q)
St v Gribble
2001 WI App 227
248 Wis. 2d 409

D. Ct shall order restitution to victim

§ 895.45(2)
§ 950.04(1v)(c)

E. Ct must allow service representative to accompany victim of abusive conduct, other than when victim is testifying or is represented by counsel, and may allow service representative to address Ct on behalf of victim

§ 950.045

F. Victim advocate may accompany victim of sexual assault, child sexual assault, human trafficking, and related offenses at law enforcement interviews, prosecution interviews, department of corrections proceedings, Ct proceedings, and postconviction proceedings

§ 950.04(1v)(e)
§ 967.10(2)

G. Cty must provide separate waiting room for victims or, if not practical, other means to minimize contact with Def

5. Standing

Wis Const art I, § 9m(2)(i)
§ 950.105

A. Crime victim has standing to assert rights in any Ct in Cty in which alleged violation occurred or may ask DA to act

Wis Const art I, § 9m(4)(a)
RMC Form CR-296
RMC Form CR-297

B. Crime victim or Atty may assert and seek in any Ct enforcement of any right and the Ct shall act promptly and afford a remedy

NOTE: The order in RMC Form CR-297 requires the Ct to specify the date on which it held a hearing on the request for enforcement of the victim's rights.

Wis Const art I, § 9m(4)(b)

C. Crime victim may obtain review of adverse decisions by filing petition for supervisory writ with appellate Cts

CR 2: INTERPRETERS

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1. When Should an Interpreter Be Appointed?

§ 885.38(3)(a)

A. In all proceedings, if Ct determines that person has limited English proficiency and that interpreter is necessary

§ 885.38(1)(b)

1) "Limited English proficiency" means:

a. Inability to adequately understand or communicate effectively in English in a Ct proceeding, because of person's use of foreign language

See generally Americans with Disabilities Act (ADA), 42 USC §§ 12101–12213

b. Inability, because of disability, to adequately hear, understand, or communicate effectively in English in a Ct proceeding

St v Yang
201 Wis. 2d 725, 733–34
(Ct. App. 1996)

2) When Ct is put on notice of potential need for interpreter because of Def's difficulty with English, Ct must determine whether difficulty may impair person's ability to:

a. Communicate with counsel

b. Understand testimony in English

c. Make self be understood in English

Strook v Kedinger
2009 WI App 31
316 Wis. 2d 548

3) Ct should make determination before any substantive hearing

4) Such determination does not require elaborate hearing and may be capable of being made upon asking a few questions

Title VI Civil Rights Act, 42 USC § 2000d; Exec Order No 13166, 65 FR 50121 (Aug 11, 2000)

B. If Ct is recipient of any type of federal funding through any source, it must comply with Title VI of the Civil Rights Act, which prohibits discrimination on the basis of national origin

1) Ct must ensure meaningful access is provided to persons with limited English proficiency

See 67 Fed Reg 41455 (June 18, 2002)

2) Ct must determine importance of service, including consequences of not providing interpreter or providing inadequate interpreter

C. Waiver of interpreter

§ 885.38(3)(a)

1) Ct must advise person of right to qualified interpreter

§ 885.38(4)(a)

2) Ct may accept waiver of right to a qualified interpreter at any point if Ct advises the person of the nature and effect and determines that waiver made knowingly, intelligently, and voluntarily

§ 885.38(4)(b)

3) Person may retract waiver for good cause at any point

St v Neave 117 Wis. 2d 359 (1984)

4) Right to interpreter is personal right and cannot be waived by Def's Atty

2. Suggested Voir Dire to Establish Need for an Interpreter

Recommendation

See Working with Interpreters in Wisconsin Courts—Benchcard for Judges, https://www.wicourts.gov/services/judge/docs/interpreterbenchcard.pdf. Judges can also access this benchcard at the end of the *Criminal Benchbook* on the Judicial Dashboard

A. Elaborate hearing unnecessary

1) Ask open-ended questions that call for complete sentences as an answer

2) When in doubt about person's ability to comprehend proceedings or to express himself/herself in English, appoint interpreter

B. Suggested questions:

1) How did you come to Ct today?
2) Describe your education for me
3) Please tell me about your home country
4) What is the purpose of your Ct hearing today?
5) Please describe what you see in this courtroom
6) How did you learn English, and what is most difficult about communicating in English?

3. Who Is a Qualified Interpreter?

§ 885.38(1)(c)

A. A "qualified interpreter" is able to:

1) Readily communicate with the person
2) Orally transfer meaning to and from English in the context of a Ct proceeding
3) Readily and accurately interpret, without omission or additions, conserving meaning, tone, and style of original statement

§ 906.04
§ 885.38(5)

B. Interpreter must be qualified and sworn as an expert. *See infra* Sec. 4

§ 885.38(6)

C. Any party may object to use of a particular interpreter and Ct may remove for good cause (*See infra* Sec. 9—Suggested Voir Dire of Interpreter Qualifications)

§ 885.38(7)

D. Delay resulting from the need to find a qualified interpreter may constitute good cause to toll time limitations

885.38(2)

E. Supreme Ct must establish policies for recruitment, training, certification, and discipline of Ct interpreters. A list of certified interpreters is available online at https://www.wicourts.gov/services/interpreter/search.htm

4. Interpreter Oaths

§ 885.38(5)
§ 906.04

A. Interpreters at trial must take oath that they will correctly interpret all proceedings

1) "Do you solemnly swear or affirm that you will interpret truly, accurately, completely, and impartially?"

B. Sign language interpreters who accompany jurors into the jury room need an additional oath

1) "Do you solemnly swear or affirm: that you will not participate personally in the jury's deliberations, nor make any comment about your personal recollections of the evidence or your opinions about the outcome of this case; and that you will not disclose or comment upon anything that you hear in jury deliberations unless ordered to do so by the Ct?"

5. Cost of Interpreters

§ 885.38(3)(a)
OAG 9A-08 (10/24/08)

A. Interpreters provided at public expense:

Americans with Disabilities Act (ADA); ADA Amendments Act of 2008

1) When interpreter needed because of a disability

§ 885.38(3)(a)

2) When person needing interpreter services is

a. Party

b. Testifying witness

c. Alleged victim, as defined in § 950.02(4)

d. Parent or legal guardian of minor party or legal guardian of party

e. Another person affected by the action, as deemed necessary and appropriate by Ct

Prakel v. Indiana
100 F. Supp. 3d 661
(SD Ind 2015)

f. Spectator, if interpreter needed because of disability

§ 885.38(8)(a)

B. Who pays

1) Cty pays expenses for in-Ct proceedings before Circuit Ct

2) Director of State Cts reimburses counties for interpreter services as provided in §§ 885.38 and 758.19

§ 885.38(3)(e)

C. Out-of-Ct services

1) Ct may approve if related to Ct proceedings, such as Ct-ordered psychiatric or medical exams or mediation

St v Le
184 Wis. 2d 860 (1994)
cf. 885.38(1)(a)

2) Out-of-Ct services for State and Cty agencies, such as PSIs and witness interviews, are budgetary responsibility of agency on behalf of which services were rendered

§ 885.38(8)(b)
St v Le
184 Wis. 2d 860 (1994)

3) SPD pays expenses for interpreters in preparing for Ct proceedings

6. Use of Interpreters

A. Before going on the record, be sure the interpreter and witness/party are able to communicate

§ 967.09
§ 807.14

B. By telephone or audiovisual means

1) Interpreter may act via telephone or videoconference at proceedings other than trial

Recommendation

2) Telephone interpreter services can be cost-effective and efficient for rare languages, short nonevidentiary proceedings, emergency matters

3) Qualified in-person interpreters preferred for longer proceedings

4) Ct must still inquire into interpreter's qualifications

§ 885.38(3)(b);
A Handbook for Court Interpreters Working in Teams (Nov. 30, 2015), https://www.wicourts.gov/services/interpreter/docs/inthandbook.pdf

C. Multiple interpreters: Ct may appoint more than one qualified interpreter when necessary

1) Recommended when Def and witness both need interpreters

2) Recommended for trials and proceedings over 2 hours

3) Recommended for multiple Defs when needed for attorney-client consultation

St v Santiago
206 Wis. 2d 3, 24 (1996)

4) Need for counsel and Def to communicate while witness is testifying

D. Interpreter for juror

§ 885.38(3)(c)

1) If a deaf or hard-of-hearing person is part of a jury panel, the Ct shall appoint an interpreter for that person

2) Sign language interpreters who accompany jurors into the jury room need an additional oath

a. "Do you solemnly swear or affirm: that you will not participate personally in the jury's deliberations, nor make any comment about your personal recollections of the evidence or your opinions about the outcome of this case; and that you will not disclose or comment upon anything that you hear in jury deliberations unless ordered to do so by the Ct?"

E. Instruction to Jury

Recommendation

1) Ct should clarify role of interpreter

a. "We will have an interpreter assist us through these proceedings. The interpreter is here only to interpret the proceedings and to enable us to communicate with each other. The interpreter is not a party in this case, has no interest in this case, does not take sides, and is not allowed to give legal advice or any other assistance"

F. Privilege and hearsay

§ 905.015

1) For privileged communications, interpreter may claim privilege on behalf of a person receiving the interpretation who holds the privilege, and interpreter's authority is presumed in the absence of evidence to the contrary

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

2) Interpreter's words are presumed to be the speech of the Def or witness for purposes of hearsay

St v Russ
2006 WI App 9
289 Wis. 2d 65

G. Caution: Shackling disruptive deaf Def may hamper ability to communicate

7. Introducing Recorded Evidence in English or Non-English Language

WI Court Interpreter Program, *Guidelines for Recorded Evidence in a Non-English Language* (2/20/23), https://www.wicourts.gov/services/interpreter/docs/guiderecevidence.pdf

A. Typically this involves documents, voice recordings, or videos in non-English to be translated into English; OR similar items in English to be translated into a non-English language. Examples include 911 call recordings, police interview recordings, and surveillance recordings

Ct should refrain from asking the interpreter to render an instantaneous interpretation of non-English audio and video recorded evidence

§ 901.09(1)

B. Ct may require a lengthy writing in non-English to be accompanied by a written translation into English with attached affidavit by the translator stating qualifications to perform translation and certifying it is true and correct

§ 901.09 cmt

1) This requirement is not intended to apply only to written documents. Should also apply to recordings

WI Court Interpreter Program, *Guidelines for Recorded Evidence* (2/20/23)

2) Ct should inform parties before trial or hearing that a transcription and translation of any non-English recorded evidence is expected to be filed before the hearing or trial

§ 901.09(2), (3)

3) Party may object to all or parts of a translation or to the qualifications of the translator. Ct may require objecting party to submit an alternative transcription and translation

WI Court Interpreter Program, *Guidelines for Recorded Evidence* (2/20/23)

C. If Ct asks interpreter to interpret recorded evidence in English, best practice is for Ct to allow interpreter to become familiar with the recorded evidence and provide a transcript

8. Court Interpreter Code of Ethics

SCR 63.003

A. Applies to:

1) Foreign language interpreters

2) Sign language interpreters

3) Real-time Ct reporters when providing access for deaf or hard-of-hearing Ct users

SCR 63.01

B. Interpretation must be complete and accurate

1) Must not alter, omit, or add to meaning of what is said or written

2) Must not explain purpose of hearings or forms

SCR 63.01 cmt

3) Will need to prepare for Ct by reviewing file, documents

SCR 63.02

C. Interpreter must accurately disclose qualifications and experience

SCR 63.03

D. Interpreter must be impartial and unbiased

1) Real or perceived appearance of conflict of interest must be reported to Ct

SCR 63.04

E. Interpreter must maintain a professional demeanor

F. Confidentiality and restriction on public comment

SCR 63.05

1) Interpreter must protect all privileged and confidential information

2) Interpreter may review confidential parts of record if relevant to the hearing to be interpreted

SCR 63.06

3) Interpreter must not publicly discuss or offer opinion on any matter, even when matter is not privileged or confidential

SCR 63.07

G. Interpreter shall not:

1) Give legal or other advice

2) Express personal opinions to persons using their services

3) Engage in other services or activities while serving as interpreter

H. Interpreters must:

SCR 63.08

1) Report to Ct any reservations about ability to perform as interpreter

SCR 63.09

2) Report to Ct any ethical violation or efforts to impede interpreter's compliance with laws, code, or Ct policies

SCR 63.10

3) Improve skills through professional education and training

9. Suggested Voir Dire of Interpreter Qualifications

Recommendation.

A. Suggested questions to establish an interpreter's qualifications:

1) [***Spoken Language***:] Are you certified as a Ct interpreter by this state or any other state or federal Ct? [***Sign Language***:] Do you hold legal certification from the Registry of Interpreters for the Deaf (RID) or other approved entity? Do you hold an interpreter license from the State of Wisconsin's Department of Safety and Professional Services?

2) Please describe your formal schooling. Do you have any formal training in interpreting? In legal or Ct interpreting?

3) Please describe your experience as an interpreter. Have you ever interpreted in Ct before? What kind of proceedings?

4) Have you spoken with the person who needs interpreting, or do you need a few minutes now to talk? Are there any communication problems?

5) Do you know any of the parties, witnesses, or attorneys? Are you aware of any conflict of interest that you might have in this case?

6) Are you able to interpret simultaneously and consecutively? Do you understand that you must interpret everything said on the record?

7) Have you read the Code of Ethics for Ct Interpreters in the Wisconsin Cts? Do you understand it and agree to abide by it?

10. Jury Instructions

Wis JI-Cr 60 — **A. Preliminary instruction: use of an interpreter for a witness**

Wis JI-Cr 61 — **B. Preliminary instruction: use of an interpreter for a juror**

Wis JI-Cr 62 — **C. Preliminary instruction: use of an interpreter for the Def**

CR 3: COUNSEL

1. Right to Counsel ..... CR 3-1
2. Appointment of Counsel ..... CR 3-3
3. SPD Appointment of Counsel ..... CR 3-4
4. Judicial Appointment of Counsel ..... CR 3-4
5. Managing Conflict of Interest ..... CR 3-6
6. Procedure for Ct Determination of Indigency ..... CR 3-7
7. Substitution or Discharge of Counsel ..... CR 3-9
8. Waiver of Right to Counsel ..... CR 3-10
9. Standby Counsel ..... CR 3-13
10. Out-of-State Counsel ..... CR 3-13

US Const amend VI
Wis Const art I, § 7
Douglas v California
83 SCt 814 (1963)
Powell v Alabama
53 SCt 55 (1932)

1. Right to Counsel

St v Pultz
206 Wis. 2d 112 (1996)
St ex rel Winnie v Harris
75 Wis. 2d 547 (1977)

A. Def has right to Atty at any proceeding in which there is possibility of incarceration

Michigan v Harvey
110 SCt 1176 (1990)
St v Jones
192 Wis. 2d 78 (1995)

1) Essence is opportunity for Def to consult with Atty and have Atty investigate case and prepare defense for trial or for hearing

US v Gonzalez-Lopez
126 SCt 2557 (2006)

2) Def has right to counsel when counsel not appointed

a. Erroneous denial of counsel of choice will result in reversal

B. Right to counsel extends to all "critical" stages

St v Mazur
90 Wis. 2d 293 (1979)
Wis JI-Cr SM-30

1) During questioning by police

St v Reitter
227 Wis. 2d 213 (1999)
St v Neitzel
95 Wis. 2d 191 (1980)

a. Decision whether to take a chemical test for intoxication not a critical stage

2) At police lineups

3) At time of initial appearance

St v Wolverton
193 Wis. 2d 234 (1995)
St v Lee
2021 WI App 12
396 Wis. 2d 136

4) At prelim

5) At evidentiary hearings

6) At arraignment

7) At trial

St v Behnke
155 Wis. 2d 796 (1990)

8) At time of return of verdict

9) At sentencing

St v Perez
170 Wis. 2d 130
(Ct. App. 1992)

a. Does not include right to counsel at presentence interview

St v Mosley
102 Wis. 2d 636 (1981)

10) Appeals

Pennsylvania v Finley
107 SCt 1990 (1987)

a. Right to appointed counsel applies to direct appeal, not to collateral attack under § 974.06

St ex rel Warren
v Schwartz
219 Wis. 2d 615 (1998)

- Not violation of due process to refuse to appoint counsel on § 974.06 collateral attack on revocation of probation

St ex rel Schmelzer
v Murphy
201 Wis. 2d 246 (1996)

11) Petition for review by Supreme Ct

St v Coerper
199 Wis. 2d 216 (1996)
St v Lass
194 Wis. 2d 591
(Ct. App. 1995)

C. Right to counsel is offense-specific

Scott v Illinois
99 SCt 1158 (1979)
Argersinger v Hamlin
92 SCt 2006 (1972)

D. Indigent Def has right to counsel appointed at public expense

Vigil v St
76 Wis. 2d 133 (1977)

1) No right to demand representation by specific Atty at public expense

Laster v St
60 Wis. 2d 525 (1973)

2) No right to "fire" Ct-appointed Atty

Rahhal v St
52 Wis. 2d 144, 147–48
(1971)
St v Batista
171 Wis. 2d 690
(Ct. App. 1992)
St v Woods
144 Wis. 2d 710
(Ct. App. 1988)

3) May not manipulate right to counsel as tool for obstruction or delay

St v Harper
57 Wis. 2d 543 (1973)

4) Entitled to "effective assistance of counsel"

a. See **Ineffective Assistance of Counsel, CR 41**

Faretta v California
95 SCt 2525 (1975)
St v Klessig
211 Wis. 2d 194, ¶ 8
(1997)
Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

E. Def has concomitant constitutional right to represent self

1) See **Right to Represent Self, Sec. 8.B.**, *infra*

St v Campbell
2006 WI 99, ¶ 74
294 Wis. 2d 100

2) No right to be represented by counsel and represent self at the same time

St v Darby
2009 WI App 50
317 Wis. 2d 478

3) Ct need not inform Def of right. Def must make clear and unequivocal declaration of intent to represent self

2. Appointment of Counsel

§ 977.07(1)

A. State Public Defender (SPD) is primary, but not exclusive, means for assuring counsel to indigents

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

B. Ct has inherent power to appoint counsel when SPD declines to act and Ct determines appointment is necessary

St v Scarbrough
55 Wis. 2d 181 (1972)

1) Ct has plain duty to appoint counsel for indigent Def

St ex rel Chiarkas v Skow
160 Wis. 2d 123 (1991)

2) Ct should appoint Atty from private bar for non-indigent individual unless no Atty available

a. Ct should appoint SPD for non-indigent individuals only in rare circumstances, given limitations on SPD services

3) When Ct makes appointment, Cty to pay

a. At conclusion of case, Ct may order reimbursement of Cty for Atty fees

St v Haynes
118 Wis. 2d 21, 27
(Ct. App. 1984)

C. Change of appointed Atty is in Trial Ct's discretion

1) Based on good cause

3. SPD Appointment of Counsel

§ 977.02(3)
Wis Adm Code ch PD 3

A. Based on rules promulgated under § 977.02(3) relating to income, assets, and anticipated cost of effective representation

§ 977.06(4)(a)

B. Ct *may* review any indigency determination on own motion or that of Def and *shall* review determination on motion of DA or SPD

St v Le
184 Wis. 2d 860 (1994)

C. Cost of out-of-Ct interpreter hired by defense counsel is charged to SPD

4. Judicial Appointment of Counsel

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

A. Ct cannot restrict itself to criteria mandated by statute for appointment of SPD

B. Standard: Does Def have sufficient income/assets to retain private counsel at market rate prevailing in community?

1) Disregard SPD's established cost of retained counsel

2) Consider fees charged by local private counsel in similar cases

3) If Ct appoints counsel for indigent Def who does not meet SPD indigency standards, Cty pays cost

St ex rel Chiarkas v Skow
160 Wis. 2d 123 (1991)

a. Ct may order non-indigent Def to reimburse Cty

St ex rel Friedrich v Dane Cty Cir Ct
192 Wis. 2d 1 (1995)

Door Cty v Hayes-Brook
153 Wis. 2d 1 (1990)

4) Rates of appointed counsel to be paid in accordance with SCR 81.02

a. In extraordinary cases, however (such as no Atty willing to take case at rates set forth in SCR), Ct may pay Atty higher rate

St ex rel Barth v Burke
24 Wis. 2d 82 (1964)

5) Ct must consider all circumstances and make finding on Def's financial ability to employ Atty

St v Buelow
122 Wis. 2d 465
(Ct. App. 1984)

a. Burden of proof on Def to show indigency

St v Kennedy
2008 WI App 186
315 Wis. 2d 507

b. Finding must be based on facts and not made arbitrarily

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

c. Ct not required to conduct independent inquiry, but must ask enough questions of Def to decide question, or order Def to report further to Ct on issue of indigency

C. Relevant considerations

1) Seriousness of charge

2) Whether Def in custody or working

3) Cost of retaining Atty

4) Income

5) Assets from which money can reasonably be raised

St v Nieves-Gonzalez
2001 WI App 90
242 Wis. 2d 782

6) Amount required to provide necessities of life for Def and dependents during pendency of case, i.e., federal poverty guidelines. See **Sec. 6.B.**, *infra*, for guidelines

7) Emergency costs

8) Cost of posting bond to obtain release

St v Lee
2021 WI App 12
396 Wis. 2d 136

9) Delay in the appointment of SPD Atty before preliminary hearing

   a. Number of SPD contacts for appointment

   b. Number of days of delay

10) Cost of Cty appointment versus cost of lengthy incarceration if delay of appointment

5. Managing Conflict of Interest

Rohl v St
65 Wis. 2d 683 (1974)

A. Def has right to separate counsel from co-Def, if interests of Defs in conflict

1) Almost always the case

St v Miller
160 Wis. 2d 646 (1991)
St v Kaye
106 Wis. 2d 1 (1982)

2) Ct should engage in colloquy with Defs at arraignment

   a. Inquire regarding possibility of conflict

   b. Ensure Def understands potential conflict

   c. Permit knowing and insistent waiver

St v Miller
160 Wis. 2d 646 (1991)
St v Demmerly
2006 WI App 181
296 Wis. 2d 153
Wis JI-Cr SM-45

B. Ct may disqualify counsel of Def, even over accused's objection and apparent waiver of right to conflict-free representation, when actual or serious potential for conflict of interest exists

Wheat v US
108 SCt 1692 (1988)

1) While there is presumption in favor of permitting Def counsel of choice, right is not absolute

St v Kaye
106 Wis. 2d 1 (1982)

2) Even serious potential for conflict does not require Ct to disqualify Atty, if Defs knowingly waive right to separate counsel and insist on having same counsel

St v Villarreal
2013 WI App 33
346 Wis. 2d 690

3) Atty who, while representing Def and witness accused of perjury, permitted police interview of witness had actual conflict that adversely affected Atty's performance

St v Miller
160 Wis. 2d 646 (1991)

4) Some factors to consider

a. Duration of Atty-client relationship

b. Amount of services already rendered

c. Availability of other lawyer of like caliber

d. Whether Atty substitution will cause delay

Caution
St v Miller
160 Wis. 2d 646 (1991)

e. Possibility that prosecutor may manufacture a conflict to eliminate formidable lawyer as adversary

Karlin v St
47 Wis. 2d 452 (1970)

C. Prosecuting Atty should never be appointed to represent indigent Def

1) Part-time DA, Ass't AG, US Atty

St v Cobbs
221 Wis. 2d 101
(Ct. App. 1998)

2) Not necessarily an actual conflict when Def's Atty is former prosecutor of Def

a. 5 years earlier and not in same case

St v Love
227 Wis. 2d 60 (1999)

b. In same case, no conflict if no failure to reveal to Def and no adverse representation

3) Conflict when Def's Atty was prosecutor in prior proceeding in same case

D. Municipal Atty (even part-time) should rarely be appointed

Recommendation

6. Procedure for Ct Determination of Indigency

A. If Def claims inability to afford counsel but is ineligible for SPD

1) Instruct Def to provide financial information

2) Have Def demonstrate to Ct that Def has attempted to retain counsel

B. Determine whether Def is indigent

1) Review Petition and Affidavit

2) If Def's income is from AFDC/W-2 benefits, or if financial information shows Def within federal poverty guidelines, Def may be considered indigent

3) Federal poverty guidelines are not the exclusive measure of indigency; many federal and state social service agencies employ an indigency benchmark higher than the federal poverty guidelines

89 FR 2961 (1/17/24)

2024 Poverty Guidelines

Size of Family Unit	Weekly	Monthly	Yearly
1	$ 290	$ 1,255	$ 15,060
2	$ 393	$ 1,703	$ 20,440
3	$ 497	$ 2,151	$ 25,820
4	$ 600	$ 2,600	$ 31,200
5	$ 703	$ 3,048	$ 36,580
6	$ 807	$ 3,497	$ 41,960
7	$ 910	$ 3,945	$ 47,340
8	$ 1,104	$ 4,393	$ 52,720
More than 8, add	+ 103	+ 448	+ 5,380

C. If Ct finds Def indigent

1) Appoint counsel from private bar (may ask SPD for local Atty certification list)

2) Compute Atty fees pursuant to SCR 81.02

3) County responsible for payment of Ct-appointed Atty fees

4) Ct may order reimbursement to Cty

a. Payment schedule

b. Wage assignment

7. Substitution or Discharge of Counsel

St v Jones
2010 WI 72
326 Wis. 2d 380

A. Indigent Def entitled to competent counsel, but not counsel of own choosing

St v Lomax
146 Wis. 2d 356 (1988)

B. Substitution of counsel within discretion of Ct

1) SPD will appoint successor counsel if Ct permits withdrawal of current counsel

St v Kazee
146 Wis. 2d 366 (1988)

C. Make inquiry of Def if Def at any time makes substantial complaint that could reasonably be interpreted as request for new counsel

St v Lomax
146 Wis. 2d 356 (1988)
St v Prineas
2009 WI App 28, ¶ 13
316 Wis. 2d 414
St v Jones
2007 WI App 248
306 Wis. 2d 340

D. Consider following factors

St v Boyd
2011 WI App 25, ¶ 13
331 Wis. 2d 697

1) Whether defense shows conflict so great that it likely results in a total lack of communication that prevents an adequate defense and frustrates a fair presentation of the case—i.e., makes continued representation untenable

St v Boyd
2011 WI App 25, ¶ 21
331 Wis. 2d 697

a. Such claim waives attorney-client privilege

2) Length of delay requested

3) Whether lead counsel has associates prepared to try case in Atty's absence

4) Whether other continuances have been requested and received by Def

5) Convenience or inconvenience to parties, witnesses, and Ct (timeliness)

   a. Eleventh-hour requests generally frowned on as tactic to delay trial

   b. However, last-minute bona fide conflict between Def and counsel could justify delay

6) Whether delay seems to be for legitimate reasons or is dilatory

St v McDowell
2004 WI 70
272 Wis. 2d 488

7) The perjury dilemma, see **CR 41, Sec. 2.E.4)** and **CR 26, Sec. 15**

Phifer v St
64 Wis. 2d 24 (1974)

8) Other relevant factors

E. Trial Ct to strike proper balance between constitutional rights of Def and efficient administration of justice

8. Waiver of Right to Counsel

St v Bangert
131 Wis. 2d 246 (1986)

A. At plea of no contest or guilty

1) By knowing and voluntary waiver of right to counsel

St v Klessig
211 Wis. 2d 194 (1997)

B. To represent self at trial

St v Klessig
211 Wis. 2d 194, ¶ 9
(1997)
Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

1) By knowing and voluntary waiver of right to counsel

Indiana v Edwards
128 SCt 2379 (2008)
St v Klessig
211 Wis. 2d 194 ¶ 9
(1997)
Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

2) By demonstrating competency to represent self

Faretta v California
95 SCt 2525 (1975)

3) Persons of average ability have independent constitutional right to represent selves

Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)
Wis JI-Cr SM-30

St v Klessig
211 Wis. 2d 194 (1997)

4) Determining competency to represent self

a. By colloquy with Def on the record

- Deliberate choice to represent self
- Aware of difficulties and disadvantages of self-representation
- Aware of seriousness of charge(s)
- Aware of general range of penalties

Indiana v Edwards
128 SCt 2379 (2008)
(distinguishing *Godinez v Moran*, 113 SCt 2680 (1993))

b. Requires more than mental competency to proceed or plead guilty

- Is more than merely understanding charges and being able to assist counsel

Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

c. Average person competent to represent self, unless specific problem or disability exists, which may prevent meaningful defense from being offered

d. Factors to consider

- Background of Def
  - — Education
  - — Literacy
  - — Fluency in English
  - — Physical or psychological condition that may significantly affect ability to communicate defense to jury
- Experience of Def
  - — Familiarity with courtroom proceedings
  - — Awareness of difficulties and disadvantages of self-representation
  - — Appreciation of seriousness of charge

— Knowledge of general range of possible penalties

- Conduct of Def must demonstrate intentional relinquishment of known right to counsel

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

C. Forfeiture of counsel explicitly or by conduct

St v Cummings
199 Wis. 2d 721 (1996)
St v Haste
175 Wis. 2d 1
(Ct. App. 1993)
St v Woods
144 Wis. 2d 710
(Ct. App. 1988)

1) When Def repeatedly, despite warnings that trial will proceed, refuses to accept services of appointed counsel, and refuses to represent self, Def can forfeit right to lawyer by conduct, by operation of law

St v Batista
171 Wis. 2d 690
(Ct. App. 1992)

2) Right to counsel cannot be manipulated so as to obstruct orderly procedure of Cts

St v Verdone
195 Wis. 2d 476
(Ct. App. 1995)

3) State's burden to show Def's conduct demonstrated forfeiture

a. Timeliness is factor

b. Intent to delay is factor

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

c. Disruptive conduct not enough

- Def's purpose must be to frustrate case progress

St v Verdone
195 Wis. 2d 476
(Ct. App. 1995)

4) No forfeiture of counsel presumed from silent record

St v Suriano
2017 WI 42
374 Wis. 2d 683
St v Cummings
199 Wis. 2d 721 (1996)

5) Five recommended steps

a. Warning that continuing Def's specific conduct will lead to finding that right to counsel forfeited

b. Colloquy with Def about difficulties and dangers of self-representation

c. Colloquy with Def about competency to represent self (See **Sec. 8.B.4**), *supra*)

d. Clear ruling when right to counsel forfeited

e. Factual findings on each of the above steps

9. Standby Counsel

St v Cummings
199 Wis. 2d 721 (1996)

A. For convenience of Trial Ct, not Def

Mayberry v Pennsylvania
91 SCt 499 (1971)

B. When there is doubt that Def has ability to represent self, Atty can be appointed to

1) Familiarize self with case and

2) Stand by as consultant on matters of

a. Examination

b. Cross-examination

c. Objecting to evidence

d. Making closing argument

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

C. Standby Atty can also protect rights of Def if Def removed from courtroom for misconduct by resuming full representation

St v Campbell
2006 WI 99
294 Wis. 2d 100

D. Ct may impose fees on Def under certain circumstances

10. Out-of-State Counsel

St v Mosley
201 Wis. 2d 36
(Ct. App. 1996)

A. Out-of-state counsel not a violation of SCR 10.03(4) if local counsel also appears and participates

B. Local counsel must be available, not necessarily present, at every stage of trial

CR 4
REMOTE PROCEEDINGS

1. Live Audiovisual/Telephonic Proceedings ..... CR 4-3

2. Requirements of Videoconferencing Technology ..... CR 4-4

3. Criteria to Consider When Ct Exercises Discretion to Allow Videoconferencing Technology ..... CR 4-5

967.08

1. Live Audiovisual/Telephonic Proceedings

A. Ct may conduct live audiovisual/telephonic proceedings for any proceeding under Chs 968–973

967.08(1)

1) Upon any party's motion or Ct's own motion

967.08(2), (4)

2) Upon consent of both parties for critical stage of proceedings

See St v Soto
2012 WI 93
343 Wis. 2d 43
See St v Anderson
2017 WI App 17
374 Wis. 2d 372
RMC Form CR-295

a. Ct must have colloquy with Def to ensure consent is made freely, voluntarily, and intelligently

b. Judge must ensure that Def and counsel can hear, see, and speak to the Judge, and vice versa

St v Anderson
2017 WI App 17, ¶ 42
374 Wis. 2d 372

- Ct should inquire as often as reasonably possible throughout proceeding if Def is able to hear and understand (especially if proceeding by telephone)
- Ct should inform Def that if Def is unable to see or hear anything during the proceeding, Def should let Ct know and it will be repeated

c. Judge should inform Def of right to not proceed by telephone or live audiovisual means

967.08(5)

3) If any party objects for non-critical stage of proceeding, Ct must consider factors in § 885.56 (*see* **Sec. 3**, *infra*) to determine whether to sustain or overrule objection

B. Requirements

967.08(1)

1) Must be held in courtroom or other place reasonably accessible to public

967.08(1)

2) Anyone entitled to attend must have simultaneous access to proceeding, without cost

St ex rel Christie v Husz
217 Wis. 2d 593
(Ct. App. 1998)

Ct's responsibility to ensure self-represented Def able to appear

967.08(1)

3) If reporting required, Ct reporter must have simultaneous communication with all parties

C. Same effect as personal appearance in Ct

967.09

D. Interpreter may appear remotely

Wright v Van Patten
128 SCt 743 (2008)

E. Def's presence in Ct with Def Atty on telephone during plea colloquy has been held not to presumptively violate 6th Amendment right to effective assistance of counsel

885.60(2)(b)

F. Witnesses via videoconferencing technology at evidentiary hearing, trial, or fact-finding hearing

1) Proponent of witness via videoconferencing technology must file notice 20 days before start of proceeding

2) Opposing party may file objection within 10 days after filing of notice

G. See CR 33, Defendant Presence/Disruption, Sec. 1.A., for proceedings when Def has right to be present at proceeding either personally or by telephone or live audiovisual means

885.54
Wis JI—Crim SM-18

2. Requirements of Videoconferencing Technology

A. Participants must be able to hear, see, and communicate with each other

B. Participants must be able to hear, see, and otherwise observe any physical exhibits or evidence

C. Adequate video/sound quality as if in courtroom

D. Ability for courtroom cameras to scan the courtroom

E. Option for counsel to be present with Def at remote location and ability to mute microphone system to allow for private communication

F. Means to transfer documents between courtroom and remote location

G. Private voice communication facility if Def and counsel are not in same location to allow for private communication

H. Proceeding must be visible and audible to jury and public to same extent as if proceeding were not by videoconference

Recommendation

Ct should consider asking Def to identify anyone else present with Def at remote location

885.56
967.08(5)

3. Criteria to Consider When Ct Exercises Discretion to Allow Videoconferencing Technology

A. Undue surprise/prejudice

B. Efforts to procure witness physically

C. Convenience and cost

D. Full cross-examination/use of exhibits

E. Importance of physical presence for truthful testimony

F. Physical liberty or fundamental interest involved

G. Ct's control over remote location

H. Participation of witness remotely results in negative diminishment or distortion

I. Decrease in formality of proceeding and effect on fairness/effectiveness

J. Witness presents a security risk if in person

K. Stipulations and waivers by parties for video appearance

CR 5: PUBLIC TRIAL

1. Open Court in General ..... CR 5-1
2. Right to Attend ..... CR 5-1
3. Motion to Close Pretrial Proceedings ..... CR 5-2
4. Restriction of Extrajudicial Statements ..... CR 5-6
5. Cameras in Courtroom ..... CR 5-6
6. Sealing Court Records ..... CR 5-9

1. Open Court in General

Billy Jo W v Metro (In re Mental Condition of Billy Jo W) 182 Wis. 2d 616 (1994)

A. Legislature and Cts are reluctant to shield judicial process from public view

St v Vanness 2007 WI App 195 304 Wis. 2d 692

B. Open Ct protects Def's rights—closing courthouse doors during trial requires new trial

St v Ndina 2007 WI App 268 306 Wis. 2d 706 *aff'd on other grounds* 2009 WI 21 315 Wis. 2d 653

1) Absent objection, removing disruptive family member does not deprive Def of public trial

St v Small 2013 WI App 117, ¶¶ 8–12, 351 Wis. 2d 46

2) Ct has authority to exclude individuals to protect integrity of trial (e.g., persons who threatened witness)

C. Open Ct assures public that judicial officials and justice system are operating properly

2. Right to Attend

A. Constitutional and statutory right of

Wis Const art I, § 7
§ 757.14

1) General public

Richmond Newspapers, Inc v Virginia 100 SCt 2814 (1980)

2) News media, not using electronic or still photographic equipment in courtroom

St ex rel LaCrosse Tribune v Cir Ct
115 Wis. 2d 220 (1983)

B. All sittings of Ct, whether in chambers or in courtroom are presumptively open to public. Includes

St v Pinno
2014 WI 74
356 Wis. 2d 106

1) Entire jury selection process

St ex rel Storer Broadcasting v Gorenstein
131 Wis. 2d 342
(Ct. App. 1986)

2) Voir dire examination of jurors in chambers

St ex rel Wis State Journal v Cir Ct
131 Wis. 2d 515
(Ct. App. 1986)

3) Reexamination of person committed after finding of not guilty by reason of mental disease or defect

Press-Enterprise Co v Superior Ct
106 SCt 2735 (1986)
St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

4) Prelims

St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

5) Immunity hearings in John Doe proceedings

St ex rel Newspapers Inc v Cir Ct
124 Wis. 2d 499 (1985)

6) Ex parte requests for Judge to issue criminal charges under § 968.02(3)

C. Permissive right of news media, when

Chandler v Florida
101 SCt 802 (1981)

1) Using electronic or still photographic equipment in courtroom

2) Subject to provisions outlined in SCR Ch 61

3. Motion to Close Pretrial Proceedings

Gannett Co v DePasquale
99 SCt 2898 (1979)

A. Both State and Def may move to close pretrial proceedings

1) May act singly or together

2) Def's Atty may bring motion without consent of Def

Comment

a. But 6th Amendment right to a public trial belongs to Def

B. Burdens of parties making motion

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

1) Moving parties must establish compelling circumstances justifying closure

C. Public or news media have right to be heard on closure request

Gannett Co v DePasquale
99 SCt 2898 (1979)
St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

1) Public or news media have standing, if

a. Present at hearing, and

b. Excluded by closure order

2) Burden to show that reasonable alternatives available to eliminate dangers shown by State or Def

Wis Const art I, § 7
St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

3) Any citizen denied access to Ct proceeding has standing to bring separate action to enforce statutory right of access

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

D. Motion addressed to sound discretion of Ct

1) Ct has inherent power to limit admission of public to courtroom in interests of justice

a. Circumstances justifying closure must be compelling

b. Must appear to be reasonable likelihood that very purpose of trial will be subverted or other cherished and legislatively recognized values would be jeopardized

Billy Jo W v Metro (In re Mental Condition of Billy Jo W) 182 Wis. 2d 616 (1994)

c. When Def requests closure, Ct balances request against public's interest in understanding and maintaining confidence in Cts

St v Pinno 2014 WI 74,¶ 72 356 Wis. 2d 106

2) When parties ask or the Ct independently considers closing the courtroom, Judge must:

a. Hold hearing on issue of closure, open to parties and members of public present in Ct, and ensure the following requirements are met:

- Party advocating for closure bears the burden;
- Ct must find an overriding interest that is likely to be prejudicial;
- Closure must be narrowly tailored to protect the overriding interest;
- Judge must consider reasonable alternatives to excluding the public; and
- Judge must make specific findings to support exclusion

St v Dean 67 Wis. 2d 513 (1975) ABA Stds—Fair Trial & Free Press § 8-3.2 (1992)

3) Grant closure motion in pretrial proceedings only if no reasonable alternatives exist to prevent substantial likelihood that pretrial publicity will interfere with Def's due-process rights

a. Make proper record

Nebraska Press Ass'n v Stuart 96 SCt 2791 (1976) *Sheppard v Maxwell* 86 SCt 1507 (1966)

4) Reasonable alternatives to closing pretrial proceedings include

a. Continuance

b. Change of venue

c. Voir dire

d. Specific instruction to jury on duty to ignore all information about case from extrajudicial sources

St v Dean
67 Wis. 2d 513 (1975)
Stelloh v Liban
21 Wis. 2d 119 (1963)
St ex rel Ampco Metal v O'Neill
273 Wis. 530 (1956)

e. In camera inspection of potentially prejudicial evidence, statements, confessions, and other sensitive information

Recommendation

- Order sealing of material while public hearing is conducted

St ex rel Goodchild v Burke
27 Wis. 2d 244 (1965)

Example: In many cases, *Goodchild* hearings are concerned with circumstances that led up to confession, rather than contents of confession, so confession can be sealed during *Goodchild* hearing.

f. Voluntary agreement by news media not to disseminate evidence adduced at any pretrial proceeding

E. Postconviction motions challenging closure of courtroom

Weaver v Massachusetts
137 SCt 1899, 1912–13 (2017)

If courtroom closed erroneously during jury selection but Def does not object, and if Def asserts ineffective assistance, structural error doctrine does not apply; Def must demonstrate prejudice

F. Specific proceedings

§ 968.26
St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

1) John Doe proceedings for which secrecy order issued—*See* **CR 48, John Doe Proceedings, Sec. 2.F.**

§ 757.14

2) Minors may be excluded from trial when graphic or obscene evidence presented

§ 970.03(4)

3) At request of complaining witness, Ct may close prelim in sexual assault matter

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

a. Notwithstanding § 970.03(4), Def has qualified 6th Amendment right to open hearing

b. Prelims presumptively open

St v Webb
154 Wis. 2d 320
(Ct. App. 1990)
rev'd on other grounds
160 Wis. 2d 622 (1991)

c. Party seeking closure must show specific overriding interest likely to be prejudiced by open hearing

4. Restriction of Extrajudicial Statements

Sheppard v Maxwell
86 SCt 1507 (1966)

A. Ct has inherent power to restrict extrajudicial statements of Attys, parties, witnesses, Ct officials, and police

Comment

1) Power should be used cautiously and sparingly

Comment

2) Examine all alternatives, including voluntary restraint

3) SCR 20:3.6 imposes limitations on Attys' public statements in criminal matter

Nebraska Press Ass'n v Stuart
96 SCt 2791 (1976)

B. Judge may not prevent news media from disseminating information obtained from

1) Public records

2) Ct proceedings

3) Participants

5. Cameras in Courtroom

SCR 61.02(2)

A. Notice

1) 3 days' notice required to Judge, before date media intends to bring cameras or equipment into courtroom

2) Waiver of notice requirement within discretion of Judge for cause

B. Prohibitions

SCR 61.07

1) Recording, broadcasting, or audio pick-up of conferences prohibited between

a. Atty and client, or

St v Wilson
149 Wis. 2d 878 (1989)

- If Def objects to placement of microphone at counsel table, Ct better advised to order microphone removed from defense table

b. Atty and co-counsel, or

c. Attys and Judge at bench

SCR 61.11

2) Photographing, recording, or broadcasting certain proceedings prohibited

a. Upon request of participant, with cause

- Presumption of validity accorded request
- Judge to exercise broad discretion

b. Upon Judge's own motion, with cause

c. Applicable to proceedings involving

- Victims of crimes, including sex crimes
- Police informants
- Undercover agents
- Relocated witnesses and Juvs
- Evidentiary suppression hearings
- Divorces
- Trade secrets
- Others, in discretion of Judge

SCR 61.11(2)

3) Photographing individual jurors prohibited

a. Purpose: To provide maximum protection for jury anonymity

b. Exceptions

- If individual juror(s) consent, or

- If jury part of unavoidable background
  - — No close-ups that identify individual jurors

SCR 61.12

4) Photographing or recording prohibited by any person or organization not part of news media

Forsythe v FCC of Dane Cty, 131 Wis. 2d 322, 327 (1986)

a. Except parties have right to make records for their own use of proceedings in which they participate

City of Oak Creek v King 148 Wis. 2d 532 (1989)
St ex rel Stevens v Cir Ct 141 Wis. 2d 239 (1987)

5) News gatherers do not have any greater right of access than does general public

C. Limitations

SCR 61.03(1)

1) Cameras

a. 3 TV cameras, each operated by 1 person

b. 3 still photographers, each using no more than 2 cameras

SCR 61.03(2)

c. Judge may authorize additional cameras or persons, upon request by media coordinator

d. Judge may limit number of cameras

- If circumstances require limitation

SCR 61.03(3)

2) 1 audio system for radio broadcast purposes

SCR 61.03(3)

3) Audio pick-up equipment

a. Audio pick-up must be connected to existing Ct audio system, if practical

b. Otherwise, microphones and related wiring must be as unobtrusive as possible

SCR 61.04

4) Equipment noise and light criteria

a. Equipment may not produce distracting noise or light

b. No artificial lighting devices used

c. All equipment must be approved by Judge before proceeding

SCR 61.06

5) Existing courtroom lighting may not be modified, unless

a. Judge approves, and

b. Other authorities approve, if required

6) Media conduct

SCR 61.05(1)

a. Media personnel may use only public areas of courtroom designated by Judge

SCR 61.05(1)

b. Media personnel must not block view of persons seated in public area of courtroom

SCR 61.05(2)

c. No movement of equipment or camera operators allowed

SCR 61.08

d. No audio or visual equipment operated during recesses

SCR 61.10

D. Disputes on Application of Rules

1) Referred to Chief Judge of district

a. Chief Judge to work with district media coordinator

2) No appellate review available from Trial Judge's or Chief Judge's ruling

6. Sealing Court Records—See Civil Benchbook, Ch CV 5, Sec. 12

CR 6: ISSUING WARRANTS/SUBPOENAS

WARRANTS ..... **CR 6-1**
1. Arrest Warrant ..... CR 6-1
2. Search Warrant ..... CR 6-3
3. Probable Cause Necessary for Arrest or Search Warrant ..... CR 6-6

SUBPOENAS ..... **CR 6-7**
1. Definition ..... CR 6-7
2. Statutory Authority ..... CR 6-8
3. Constitutional Compulsory Process ..... CR 6-9
4. Subpoena *Duces Tecum* ..... CR 6-10
5. Subpoena for Documents ..... CR 6-11
6. Electronic Records and Devices ..... CR 6-11

WARRANTS

1. Arrest Warrant

§ 757.69(1)(b)

A. May be signed by Judge or Circuit Ct Comm'r and all references to Judge in this section include both

B. Must be based on complaint

§ 968.01(2)

1) Complaint is written statement of essential facts constituting crime charged, made on information and belief and upon oath before DA or Judge

§ 968.01(3)

a. Use of telephone: Complaining witness may make statement under oath by phone with DA and Judge

§ 968.01(4)

- Immediately thereafter, complainant's signed statement must be transmitted by fax or electronically transmitted and accompanied by the person's electronic signature to DA or Judge

968.01(3)

- Original signed statement must also be sent to DA or Judge if originally transmitted by fax

- Both original and fax copy must be filed under § 968.02

St v Olson
75 Wis. 2d 575 (1977)

2) Complaint is self-contained charge setting forth facts together with any reasonable inferences that lead reasonable person to believe Def committed a crime

§ 968.02(2)

3) Complaint issued and filed with Judge who issues warrant or summons or dismisses for lack of probable cause

C. When issued

§ 968.04(1)

1) When probable cause to believe offense committed by Def

a. Based on complaint, affidavits, or testimony of complainant or witnesses under oath

§ 968.04(1)(d)

b. Use of telephone: Complainant or witness may testify by phone at request of person seeking warrant, unless good cause to contrary

- Judge places each witness under oath and arranges for recording testimony by Ct reporter or by voice recording device
- Judge has record transcribed and transcript, certified as accurate by Judge or reporter, filed with Ct
- Original tape recording filed by Judge

St v Williams
47 Wis. 2d 242 (1970)

2) Magistrate may ask questions to satisfy self that probable cause exists, but transcript of hearing may not substitute for requirement that complaint recite probable cause

St ex rel Pflanz v Cty Ct
36 Wis. 2d 550 (1967)

3) Showing of facts and circumstances must be sufficient for neutral magistrate to make own independent determination of probable cause

§ 968.04(2)(a)

4) DA may issue summons in lieu of requesting warrant after issuing complaint

§ 968.04(2)(b)

a. In misdemeanor actions with penalties of 6 months or less, Judge must issue summons instead of warrant, unless reason to believe Def will not appear in response to summons

§ 968.04(2)(b)

b. Judge may elect to issue summons instead of warrant in any case

§ 968.04(3)(a)8.

c. Summons and complaint may be on same form

D. Mandatory provisions

1) Warrant shall

§ 968.04(3)(a)1. a. Be in writing and signed by Judge

§ 968.04(3)(a)2. b. State name of crime and section charged and number of section allegedly violated

§ 968.04(3)(a)3. c. Have copy of complaint attached

§ 968.04(3)(a)4. d. State name of person to be arrested or, if not known, designate person by reasonably certain description

§ 968.04(3)(a)5. e. State date warrant issues, name of Judge, and title of Judge's office

§ 968.04(3)(a)6. f. Command that person be arrested and brought before issuing Judge or other Judge in same county

2. Search Warrant

A. Definition

US Const amend IV
Wis Const art I, § 11
§ 968.12(1)
§ 968.12(4)

1) Order directing officer to conduct search or seizure of designated person, place, or thing, and/or designated property or kinds of property

2) The persons, places, or things to be searched or seized shall be stated with particularity

§ 757.69(1)(b)

3) May be signed only by Judge or Circuit Ct Comm'r (all references to "Judge" include both)

§ 968.12(4)
§ 968.13(1)

4) May be issued anywhere in the State for a search anywhere in the State pertaining to a crime committed anywhere in the State or outside of the State

B. Basis for Issuance

§ 968.12(1)
§ 968.12(2)

1) Request for search warrant based on the applicant's information and belief showing probable cause

Illinois v Gates
103 S. Ct. 2317 (1983)

a. Determination of probable cause based on totality of circumstances

Illinois v Gates
103 S. Ct. 2317 (1983)

b. Information presented may be based on hearsay, provided one can conclude under totality of circumstances that informant credible and information obtained in reliable manner

St v Lopez
207 Wis. 2d 413
(Ct. App. 1996)

c. Information presented need not be drafted with elaborate specificity

C. Procedures for Issuance

§ 968.12(2)
§ 968.12(3)(a)

1) Information supporting warrant may be presented in sworn written affidavit or complaint, or by sworn oral testimony communicated to the Judge by telephone, radio, or other means of electronic communication

§ 968.12(2)

a. Contents of warrant based on written affidavit may be sworn to before notary or Judge. If sworn before Judge, need not be face-to-face. Judge shall indicate on warrant that person so swore to the affidavit

§ 968.12(3)(e)

b. The contents of a warrant based on oral testimony shall be the same as contents of a warrant based on affidavit

§ 968.12(5)

2) Person requesting warrant may sign by using an electronic signature, handwritten signature, or a handwritten signature that is electronically imaged

3) Duplicate originals

§ 968.12(3)(b)1.

a. Person requesting warrant reads the duplicate original warrant to Judge

§ 968.12(3)(b)1.

b. Judge shall enter verbatim what is read on original warrant or may modify the warrant

§ 968.12(3)(b)1.

c. If probable cause for warrant, Judge shall issue warrant by directing requester to sign the Judge's name on duplicate original. Requester shall also sign own name

§ 968.12(3)(b)1.

d. Immediately, when available, Judge shall sign original warrant and enter exact time warrant was ordered

4) Electronic transmission

§ 968.12(3)(b)2.

a. Person requesting warrant signs warrant and transmits to Judge

§ 968.12(3)(b)2. b. Judge may modify the warrant

§ 968.12(3)(b)2. c. If probable cause for warrant, Judge shall sign and enter exact time

§ 968.12(3)(b)2. d. Judge shall immediately transmit signed warrant to requester

5) Recording and certification

§ 968.12(3)(d) a. Judge shall place under oath each person whose testimony forms basis for application and each person applying for warrant

§ 968.12(3)(d) b. Judge or requester shall arrange for all sworn testimony to be recorded by Ct reporter or by voice recording device

§ 968.12(3)(d) c. Judge shall have recording transcribed and shall be certified as accurate by Judge or reporter

§ 968.12(3)(d) d. Transcript must be filed with Ct

D. Property subject to seizure

§ 968.13(1) 1) Search warrant may authorize seizure of

§ 968.13(1)(a) a. Contraband

§ 968.13(1)(b) b. Anything that is fruit of, or used in commission of, any crime or non-criminal OWI violation

§ 968.13(1)(c) c. Anything other than documents that may be evidence of any crime

§ 968.13(1)(d) d. Documents that are evidence of any crime, with probable cause showing they are under control of person reasonably suspected to be party to that crime under § 939.05(2)

§ 968.135 2) Documents may be obtained by subpoena rather than search warrant

§ 968.135 a. Ct may issue subpoena requiring production of documents upon

- Request of AG or DA, and
- Showing of probable cause under § 968.12(1)

§ 968.135

b. Documents returned to and motions to limit or quash subpoena must be addressed to issuing Ct

§ 968.135

c. Person failing to comply may be compelled to do so according to Ch 785, Contempt of Ct

St v Hayes
196 Wis. 2d 753
(Ct. App. 1995)

E. Search warrant may authorize search of unnamed persons on premises to be searched as long as basis in affidavit

Richards v Wisconsin
117 S. Ct. 1416 (1997)

F. "No-knock" warrants

St v Cleveland
118 Wis. 2d 615 (1984)
St v Watkinson
161 Wis. 2d 750
(Ct. App. 1991)

1) "No-knock" warrant may be issued if specific evidence of danger to safety or destruction of evidence presented

St v Whiting
2003 WI App 101
264 Wis. 2d 722

a. Police must be aware of such evidence at time of entry

G. "Anticipatory" warrants

St v Meyer
216 Wis. 2d 729 (1998)

1) Not required that warrant contain explicit statement that delivery of contraband must occur before execution of warrant

2) Affidavit must demonstrate that contraband is on sure course to premises to be searched

St v Falbo
190 Wis. 2d 328
(Ct. App. 1994)

3) Do not violate 4th Amendment if limited to execution during a limited time period

3. Probable Cause Necessary for Arrest or Search Warrant

St v Lee
157 Wis. 2d 126
(Ct. App. 1990)

A. Equated with "a fair probability"

1) Must be sufficient facts to support honest belief in reasonable mind that crime committed

St v Ehnert
160 Wis. 2d 464
(Ct. App. 1991)

2) Fluid concept based on commonsense assessment of probabilities in particular factual situation

3) To be determined under practical considerations of everyday life on which reasonable and prudent persons act

St v Higginbotham
162 Wis. 2d 978 (1991)
St v Lindgren
2004 WI App 159
275 Wis. 2d 851

4) Quantum of evidence necessary to establish probable cause less than that required to support bindover at prelim

5) Facts must provide more than mere hunch or bare recital of legal conclusions by officer

St v Multaler
2002 WI 35
252 Wis. 2d 54

6) Facts must present fair probability that object sought in search warrant will be found in place to be searched

St v Ehnert
160 Wis. 2d 464
(Ct. App. 1991)

St v Moley
171 Wis. 2d 207
(Ct. App. 1992)

B. "Stale" facts not sufficient to support search warrant

1) Facts proved must justify finding of probable cause at time search warrant issued

2) Staleness not determined by specific number of days or months between occurrence of facts and issuance of warrant

3) Passage of time less significant when activity of protracted, continuous nature

4) Relevant factors to determination of staleness

a. Nature and pattern of criminal activity under investigation

b. Nature of what sought

St v Noll
111 Wis. 2d 587
(Ct. App. 1983)
aff'd 116 Wis. 2d 443
(1984)
St v Nicholson
174 Wis. 2d 542
(Ct. App. 1993)

5) Defective portion of warrant does not necessarily invalidate entire warrant or fruits

SUBPOENAS

1. Definition

81 Am Jur 2d *Witnesses*
§§ 6, 10, 12, 13

A. Writ for compelling attendance of person before Ct or other tribunal at time and place designated

1) To testify as witness until dismissed by Ct

B. Witness cannot disregard authority of Ct before which summoned

1) Even if believes testimony irrelevant

C. Propriety of subpoena for Ct to decide

2. Statutory Authority

§ 757.01(1)

A. Cts of record have power to issue subpoenas requiring attendance of any witness residing or in State to testify in any matter

§ 885.01

1) Need not be sealed

§ 885.01(1)

2) May be issued by any Judge, Clerk of Ct, Ct Comm'r, or Municipal Judge within jurisdictional territory to require attendance of witnesses and production of evidence in any pending matter

§ 805.07(2)

B. May command person to produce books, papers, documents, electronically stored information, or tangibles designated

§ 805.07(3)
St ex rel Green Bay Newspaper Co v Circuit Ct
113 Wis. 2d 411 (1983)
St v Groppi
41 Wis. 2d 312 (1969), *vacated on other grounds*
91 S. Ct. 490 (1971)

C. Ct may quash, modify, or conditionally approve subpoena upon prompt motion

§ 805.07(3)

1) Ct may quash or modify subpoena, if unreasonable and oppressive, or

§ 805.07(3)

2) Ct may conditionally approve subpoena, upon advancement of reasonable costs of producing materials by person requesting subpoena to person subpoenaed

§ 885.10

D. Upon satisfactory proof of Def's inability to procure witness for defense, Judge may direct witness to be subpoenaed as necessary and proper upon Def's or Atty's oath or affidavit

§ 968.09(1)

E. If subpoenaed witness fails to appear, Ct may issue bench warrant

§ 969.01(3)

F. In a felony case, upon affidavit showing witness's testimony is material and that it is impracticable to serve subpoena, Ct may issue a material witness warrant and require witness to post bail

§ 976.02(2)(a)

G. In an out-of-state case, upon receipt of certification of out-of-state Judge that the person is a material witness to a criminal prosecution or grand jury proceeding, Wis Ct to set hearing on whether witness must appear in other state

§ 976.02(2)(b)

1) If Wis Ct finds that witness is material and necessary, there is no undue hardship, and that the other state (and any states through which witness must pass) will protect witness from arrest and service of process, Wis Ct shall issue summons directing witness to attend and testify in other state's Ct

§ 976.02(2)(c)

2) If out-of-state Judge's certificate recommends that witness be taken into custody, Wis Ct may waive notice of hearing and direct that witness be brought before Wis Ct

a. Upon hearing, Wis Ct may order that witness be taken into custody and delivered to officer of other state

3. Constitutional Compulsory Process

US Const amend IV
Wis Const art I, § 7
Taylor v Illinois
108 S. Ct. 646 (1988)
St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

A. Def entitled to compulsory process to obtain witnesses in own behalf

Washington v Texas
87 S. Ct. 1920 (1967)

1) Right is fundamental and essential to fair trial

St v Wallis
149 Wis. 2d 534
(Ct. App. 1989)

a. Motion to quash subpoena should not be granted lightly

b. Standard applied on motion to quash

- Whether Def can show reasonable probability that subpoenaed witness's testimony will lead to competent, relevant, material, and exculpatory evidence

2) Right no more absolute than any other constitutional right

3) May be limited to witnesses who can offer relevant or material evidence on Def's behalf

Michigan v Lucas
111 S. Ct. 1743 (1991)

a. Trial Judge retains wide latitude to limit, reasonably, Def's right to compulsory process

St v Thompson
146 Wis. 2d 554
(Ct. App. 1988)

4) Def has no right to present evidence that is not relevant

§ 885.03

B. Witness in criminal case may be properly served with subpoena by:

1) Exhibiting and reading it to witness; or

2) Giving the witness a copy; or

3) Leaving subpoena at the witness's abode

St v Wilson
2017 WI 63, ¶ 36
376 Wis. 2d 92

a. Reasonable diligence to serve personally is not required

4. Subpoena *Duces Tecum*

§ 805.07(2)

A. Subpoena commanding production of books, papers, documents, electronically stored information, or tangibles designated

Nashban Barrel Co v GG Parsons Trucking Co
49 Wis. 2d 591 (1971)

1) Relevancy of requested documents need not be alleged in fact

2) Must be complied with in absence of reasonable excuse

3) Question of reasonableness is for Ct

B. Disclosure sought shall not be unreasonable

US v Nixon
94 S. Ct. 3090 (1974)
Custodian of Records for LTSB v St
2004 WI 65
272 Wis. 2d 208,
amended and reconsideration denied
2004 WI 149
277 Wis. 2d 75

1) Must show documents sought are relevant to inquiry and adequate

2) May not be excessive for its purpose

3) Relevancy and adequacy vary in relation to nature, purpose, and scope of inquiry

Oklahoma Press Publ'g Co v Walling 66 S. Ct. 494 (1946)

4) Privilege against self-incrimination gives no protection to corporations or their officers against production of corporate records by subpoena

Neu's Supply Line v Dept of Rev 52 Wis. 2d 386 (1971)

C. When factual dispute on relevancy arises, must present evidence to Ct

§ 968.135

5. Subpoena for Documents

§ 968.13(2)

A. "Documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films, or computer or electronic data

B. AG or DA may request a subpoena for documents

1) Request must show probable cause

C. Ct shall issue subpoena and documents shall be returnable to the Ct

D. Motions, including to quash or limit the subpoena, must be heard by issuing Ct

E. Production of documents may be compelled by finding of contempt

6. Electronic Records and Devices

A. Interception of Wire, Electronic, or Oral Communications

1) Refers to real-time monitoring and recording of communications, i.e., wiretaps

2) Must be requested by AG and DA

Caution

3) May be issued **only** by chief judge

4) *See* **CR 45, Electronic Surveillance**

B. Pen Registers/Trap and Trace Devices

§ 968.27(13)

1) *Pen register* is a device that records or decodes electronic or other impulses that identify numbers dialed or otherwise transmitted on the line to which the device is attached

§ 968.27(15)

2) *Trap and trace device* is a device that captures incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted

§ 968.35(1)

3) AG or DA may request order authorizing or approving installation or use of pen register or trap and trace

§ 968.36(1)

4) Ct shall enter ex parte order authorizing if Ct finds that the information likely to be obtained is relevant to an ongoing criminal investigation

§ 968.36(3), (4)

5) Order is valid for up to 60 days, with a 60-day extension upon a new application with grounds

§ 968.36(5)

6) Order shall be sealed and shall provide that existence of the device or investigation not be disclosed to the subscriber or any other person

C. Warrant to Track a Communications Device

§ 968.373(3)

1) AG or DA may request warrant

§ 968.373(3)(e)

2) Application must show certain identifying information and that there is probable cause to believe criminal activity has been, is, or will be in progress and that identifying or tracking the device will yield relevant information

Carpenter v US
138 S. Ct. 2206 (2018)

a. Even obtaining historical cell-phone location data is a search within the 4th Amendment and requires a showing of probable cause

§ 968.373(3)

3) Application may be made orally or in writing

§ 968.373(4)

4) Warrant is valid for up to 60 days, with an unlimited number of 60-day extensions upon request showing that grounds continue to exist

§ 968.373(6m) 5) A return shall be filed not later than 5 days after the information is received

§ 968.373(4m) 6) Ct may issue order sealing application and prohibiting disclosure of the existence of the warrant and investigation

§ 968.375 **D. Subpoena and Warrants for Records or Communications of Customers of Electronic Communication Service or Remote Computing Service Provider**

§ 968.375(2) 1) Subpoena

a. AG or DA may request subpoena

§ 968.375(2)(a) b. Request for subpoena must show probable cause

§ 968.375(2)(a) c. Ct may issue subpoena requiring a person who provides electronic communication service or remote computer service to disclose within a reasonable time a record or other information pertaining to a customer of the service, including:

- Name
- Address
- Local/long distance telephone records, including times and durations
- Length of service, start date, types of service
- Telephone, instrument, subscriber, or other number or identity, including temporarily assigned network address
- Means/source of payment for service, including credit card or bank account number

§ 968.375(2)(b) d. Subpoena may **not** require disclosure of the contents of communications

§ 968.375(3) 2) Warrant

§ 968.375(3) a. AG or DA may request a warrant

§ 968.375(3) b. Request for warrant must show probable cause

c. Ct may issue warrant requiring a person who provides electronic communication services or remote computing service to disclose within a reasonable time:

§ 968.375(2)(a)
§ 968.375(3)(b)
- Same information as for a subpoena (above), and/or

§ 968.375(3)(a)
- Content of a wire or electronic communication that is in electronic storage in an electronic communications system or held or maintained by a provider of remote computing service

§ 968.375(3)(c)
- A record or information that identifies the location of a device used to transmit electronic or wire communications

§ 968.375(4)
§ 968.12
3) Either subpoena or warrant may be applied for and/or issued by affidavit or oral testimony using same standards as for issuance of search warrant

§ 968.375(9)
4) A return shall be filed within 5 days after receipt of records or information

§ 968.375(10)
5) Ct may seal subpoena, warrant, affidavit, or testimony and may issue order prohibiting person served from disclosing to the customer or subscriber

E. Installation of GPS Devices on Vehicles or in Objects

St v Pinder
2018 WI 106
384 Wis. 2d 416
1) Ct order required but is not a search warrant and is not subject to search warrant limitations or return requirements

a. Order is issued pursuant to Ct's inherent authority

St v Pinder
2018 WI 106
384 Wis. 2d 416
US v Jones
132 S. Ct. 945 (2012)
2) Constitutes a search for 4th Amendment purposes; application must be supported by probable cause, and a description of the object to be placed, the circumstances that led agents to wish to install it, and the length of time for which surveillance is requested

CR 7: INITIAL APPEARANCE

1. Probable Cause Finding Before Initial Appearance—*Riverside* Review ..... CR 7-1
2. Conducting the Initial Appearance ..... CR 7-1
3. DNA at Arrest Violations ..... CR 7-5

1. Probable Cause Finding Before Initial Appearance—*Riverside* Review

Gerstein v Pugh
95 S. Ct. 854 (1975)

A. Fourth Amendment requires a prompt judicial determination of probable cause as prerequisite to extended pretrial detention

Cty of Riverside v McLaughlin
111 S. Ct. 1661 (1991)

B. For Def arrested without warrant, probable cause finding must be made by Judge or Ct Comm'r no later than 48 hours after arrest (weekends and holidays included)

1) Unreasonable delay may be established, even when finding made in less than 48 hours, if delay for purpose of gathering additional evidence to justify arrest, delay motivated by ill will, or delay for delay's sake

St v Harris
174 Wis. 2d 367
(Ct. App. 1993)
St v McKinney
168 Wis. 2d 349
(Ct. App. 1992)

C. 48-hour rule does not apply if probation/parole hold in effect or if already in lawful custody on an unrelated matter

St v Golden
185 Wis. 2d 763
(Ct. App. 1994)

D. Motion to dismiss should not be granted on event of non-prejudicial *Riverside* violation

E. Probable cause determination does not involve any adversarial rights and can be based entirely on hearsay and written testimony

St v Koch
175 Wis. 2d 684, 698
(1993)

F. Def has no right to be present when judicial officer makes probable cause determination

Recommendation

G. Consider it the same as an application for a warrant

2. Conducting the Initial Appearance

§ 970.01(1)

A. Shall be conducted "within a reasonable time" after arrest

St v Koch
175 Wis. 2d 684 (1993)

1) Requirement to conduct initial appearance within "reasonable time" is different than requirement to review probable cause within 48 hours after Def being taken into custody

St v Harris
174 Wis. 2d 367
(Ct. App. 1993)

a. Delay in initial appearance is never unreasonable if Def already in lawful custody of State

§ 970.01(2)

B. If person arrested without warrant and brought before Judge, complaint filed forthwith

§ 970.01(1)

C. Def may waive physical appearance and request that initial appearance be conducted on the record by telephone or live AV means

1) Def may authorize Atty to act and may be excused from attendance at initial appearance and arraignment with leave of Ct

St v Krause
161 Wis. 2d 919
(Ct. App. 1991)

2) CAUTION: Def's absence does not relieve Ct of ensuring that record reflects that Def has all information and all understanding necessary to meet constitutional standards

§ 968.03(1)

D. Review factual portion of complaint to determine probable cause that the Def has committed the charged offense(s)

§ 970.02(1)(a)

E. Inform Def of charge(s)

§ 971.05(3)
§ 970.02(1)(a)

F. Give Def copy of complaint

1) Offer reading of charging paragraphs of misdemeanor complaint. May be waived by defendant

§ 970.02(1)(a)
St v Thompson
2012 WI 90
342 Wis. 2d 674

G. Advise as to penalties if felony—Ct's failure to do so may be harmless error if no prejudice to Def

§ 970.02(1)(b), (6)
St ex rel Winnie v Harris
75 Wis. 2d 547 (1977)

H. Inform Def of right to counsel and, if offense punishable by incarceration, at public expense, if eligible

"Because this charge carries with it the possibility of jail time, you have the right to be represented by an Atty. If you cannot afford to hire your own Atty, you have the right to have an Atty appointed to represent you at the public's expense"

Recommendation

1) If Def indicates desire to obtain counsel, may adjourn initial appearance

If initial appearance not adjourned, Ct should extend time limits for substitution requests and filing motions

§ 970.02(6)

2) If Def claims or appears to be indigent, refer to State Public Defender (SPD) for indigency determination under § 977.07(1)

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

3) If Def found not indigent by SPD, but still claims cannot afford counsel

§ 977.06(4)(a)

a. Conduct review of correctness of SPD application of administrative rules for appointment of counsel, if requested, or

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

b. Review Def's finances and determine whether Def indigent for appointment of counsel at Cty's expense

c. May set over initial appearance/arraignment, if necessary for appointment of counsel

§ 971.05(3)

I. If misdemeanor charges, ask Def how Def pleads to charge in complaint ("instant arraignment")

§ 971.06(2)

1) Enter plea of not guilty if Def stands mute

§ 970.02(2)

J. Set bail/bond and conditions of release pursuant to Ch 969. See CR 8 (Bail/Bond/Conditions of Release)

§ 165.83(2)(a)
§ 970.02(7)

K. If not already obtained by police, direct that fingerprints, photographs, and other identifying data be obtained if Def charged with

1) A felony

2) A misdemeanor or ordinance violation involving

a. Burglary tools

b. Commercial gambling

c. Dealing in gambling devices

d. Contributing to the delinquency of a child

e. Dealing in stolen property

f. Controlled substances or controlled substance analogs

g. Firearms

h. Dangerous weapons

i. Explosives

j. Pandering

k. Prostitution

l. Sex offenses where children are victims

m. Worthless checks

n. Disorderly conduct, if related to an act connected with one of the above

3) Being a fugitive from justice

§ 165.83(2)(a)5.
Wis DOJ CIB
Identification Manual

4) Other offenses designated by AG

a. Stalking

b. Harassment

§ 970.02(8)

L. If Def charged with violent crime under § 165.84(7)(ab), determine whether DNA was taken

Note

List of violent crimes found at end of chapter

1) If not, direct law enforcement agency or tribal law enforcement agency to obtain and submit DNA to State Crime Labs

2) Inform Def of right to request expungement of DNA sample under § 165.77(4)

§ 970.02(1)(c)

M. If felony, Def entitled to prelim

N. Schedule prelim

§ 970.03(2)

1) Within 10 days, if Def in custody and bail more than $500

2) Within 20 days, if Def released from custody or bail is $500 or less

State v. Lee
2021 WI App 12
396 Wis. 2d 136

3) Time limits may be waived by stipulation or upon good cause

3. DNA at Arrest Violations

CAUTION: This list is different than the list of violent crimes for the purposes of bail under § 969.001(3).

Per § 165.84(7)(ab)1. and § 165.84(7)(ab)4.—Felony violation of or solicitation, attempt, or conspiracy to commit the following felonies:

Statute	Violation
§ 940.01	1st-Degree Intentional Homicide
§ 940.05	2nd-Degree Intentional Homicide
§ 940.21	Mayhem
§ 940.225(1), (2) , or (3)	1st-, 2nd-, 3rd-Degree Sexual Assault
§ 940.235	Strangulation and Suffocation
§ 940.30	False Imprisonment
§ 940.302(2)	Human Trafficking
§ 940.305	Taking Hostages
§ 940.31	Kidnapping
§ 940.32(2), (2e), or (2m)	Stalking
§ 940.43	Intimidation of Witness
§ 940.45	Intimidation of Victim
§ 941.20	Endangering Safety by Use of Dangerous Weapon
§ 941.21	Disarming a Peace Officer
§ 941.327	Tampering with Household Products
§ 943.02	Arson
§ 943.06	Molotov Cocktails
§ 943.10	Burglary
§ 943.23(2)	Operating a Motor Vehicle Without Owner's Consent
§ 943.231(1)	Armed Carjacking
§ 943.32	Robbery
§ 948.02(1) or (2)	1st-, 2nd-Degree Sexual Assault of a Child
§ 948.025	Repeated Sexual Assault of a Child
§ 948.03(2)(a) or (c) or (5)(a)1., 2., 3, or 4. (but not § 948.03(2)(b))	Intentional Physical Abuse of a Child or Repeated Acts of Physical Abuse of a Child
§ 948.05	Sexual Exploitation of a Child
§ 948.051	Trafficking a Child
§ 948.055	Causing Child to View/Listen to Sexual Activity
§ 948.07	Child Enticement
§ 948.08	Soliciting Child for Prostitution
§ 948.085	Sexual Assault of Child in Substitute Care
§ 948.095	Sexual Assault of Child by School Staff, etc.
§ 948.30(2)	Abduction of Child by Force

Per § 165.84(7)(ab)2.—Felony violation of the following:

Statute	Violation
§ 940.02	1st-Degree Reckless Homicide
§ 940.03	Felony Murder
§ 940.06	2nd-Degree Reckless Homicide
§ 940.07	Homicide by Negligent Control of Animal
§ 940.08	Homicide by Negligent Operation or Handling of Weapon, Explosives, or Fire
§ 940.09(1c)	Homicide by Intoxicated Use of Motor Vehicle or Firearm
§ 940.10	Homicide by Negligent Operation of Motor Vehicle
§ 940.19(2), (4), (5), or (6)	Battery
§ 940.195(2), (4), (5), or (6)	Battery to Unborn Child
§ 940.20	Battery with Special Circumstances
§ 940.201(2)	Battery or Threat to Witness
§ 940.203(2)	Battery or Threat to Judge
§ 940.204	Battery or Threat to Health Care Providers and Staff
§ 940.205(2)	Battery to Department of Revenue Employee
§ 940.207(2)	Battery to DSPS or DWD Employee
§ 940.208	Battery to Certain Municipal Employees
§ 940.23	Reckless Injury
§ 941.30	Recklessly Endangering Safety
§ 948.03(3) or (5)(a)4.	Reckless Causation of Bodily Harm

Per § 165.84(7)(ab)3., any felony if a penalty enhancer in § 939.621 (domestic abuse repeater) could be imposed.

CR 8: BAIL/BOND/CONDITIONS OF RELEASE

1. Setting Bail/Bond ..... CR 8-1
2. Reviewing Bail ..... CR 8-6
3. Revocation of Bail for Commission of Serious Crime ..... CR 8-7
4. Revocation of Bail for Victim/Witness Intimidation ..... CR 8-8
5. Forfeiture of Bail ..... CR 8-8
6. Denial of Bail (Preventative Detention) ..... CR 8-9
7. Bail After Conviction ..... CR 8-11
8. Disbursement of Bail After Conviction ..... CR 8-12
9. List of Violent Crimes for Purposes of Bail Under § 969.001(3) ..... CR 8-13

§ 757.69(1)(b)

For the purposes of this chapter, all references to Judge also include Ct Comm'rs.

1. Setting Bail/Bond

§ 969.001(1)
§ 967.02(1d)
St v Iglesias
185 Wis. 2d 117 (1994)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)

A. Bail: Monetary condition of release designed to ensure Def will appear as required and will comply with bond conditions

§ 967.02(1h)

B. Bond: Undertaking by which Def agrees to comply with conditions of release

C. Hearing

§ 969.08(8)

1) Information offered need not conform to rules of evidence

   a. Except for revocation of bail before conviction

   b. See **Revocation of Bail for Commission of Serious Crime and Revocation of Bail for Victim/Witness Intimidation, Secs. 3 and 4,** *infra*

2) Ask both Def's and DA's recommendation for bail

Wis Const art I, § 9m

3) Upon request, victims entitled to make recommendation

§ 969.01(1)
65 OAG 102 (1976)

4) Bail/bond may be set before filing of complaint